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No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1944

CANADIAN AVIATOR LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 4–5) is reported in 52 F. Supp. 211. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 7–22) is reported in 142 F. (2d) 709.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on May 2, 1944 (R. 22). The petition for a writ of certiorari was filed on July 21, 1944. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Public Vessels Act of 1925 authorizes a libel in admiralty against the United States to recover damages sustained by a privately owned vessel which, while complying with an order of United States naval authorities to follow directly astern of a public vessel of the United States, collided with a submerged wreck.

STATUTES INVOLVED

The Public Vessels Act, 1925 (43 Stat. 1112–1113, 46 U. S. C. 781–790), and the relevant portions of the Suits in Admiralty Act, 1920 (41 Stat. 525–526, 46 U. S. C. 741–752), are set forth in the Appendix, *infra*, pp. 12–16.

STATEMENT

On August 4, 1942, petitioner, owner of the steamship *Cavelier*, filed a libel *in personam* in admiralty against the United States in the United States District Court for the District of New Jersey, seeking to recover for damages to the *Cavelier*. The libel, in substance, alleged that on July 7, 1942, the *Cavelier*, while en route from Canada to Jamaica, was ordered by United States naval authorities to enter Delaware Bay; that upon approaching the entrance to the bay, the *Cavelier* was ordered by such authorities to follow

directly astern of the naval patrol boat *YP 249*, a public vessel of the United States; that while following directly astern of the *YP 249*, as ordered, "the *Cavelier* struck a submerged wreck and sustained serious damages;" and that the collision with the wreck and resultant damages were due "solely to the fault and negligence of the United States Vessel *YP 249* and those in charge of her" (R. 1–3).

On August 17, 1942, the United States appeared specially and excepted to the libel on the ground that it failed to state a cause of action for which the United States had consented to be sued (R. 3–4). The district court ruled that the damages to the *Cavelier* were not caused by the *YP 249*, but by the negligence of its officers (R. 4–5), and on June 22, 1943, entered a decree sustaining the exceptions and dismissing the libel (R. 5–6). On appeal, the Circuit Court of Appeals for the Third Circuit affirmed (R. 22), Judge Biggs dissenting (R. 15–22).

ARGUMENT

The suit at bar being against the United States, it cannot be maintained in the absence of a statutory waiver of sovereign immunity. Petitioner seeks to draw the requisite waiver from the Public Vessels Act of 1925, Section 1 of which provides that "a libel *in personam* in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United

States" (Appendix, *infra*, p. 12). The court below, however, held that the Act did not extend the waiver of sovereign immunity "beyond those cases in which the vessel itself was the physical instrument by which the damage was done" (R. 11), and since the injuries to the *Cavelier* were not caused by the *YP 249*, as such, but by the negligence of the naval officers whose directions the *Cavelier* was following, the court concluded that the damages were not "caused by a public vessel" within the meaning of the Act. This decision is correct and presents no conflict.

1. The Act applies only if the damages were "caused by a public vessel" (sec. 1 of the Public Vessels Act). The *YP 249* was in no sense the physical cause of the damage, for, as suggested below (R. 15), petitioner's grievance would have been no different if the naval authorities had directed the course of the *Cavelier* from shore by radio or from the *Cavelier's* own bridge instead of from the bridge of the *YP 249*. That this element is fatal to maintenance of a libel under the Public Vessels Act is reasonably clear from both the legislative history and judicial precedent under similar statutory language, which establish that the standard of recovery in Section 1 of the Act in question requires that the vessel as distinguished from its personnel constitute the cause of the damage. The report of the House Committee on Claims on the bill (H. R. 9535), which became the Public Vessels Act (a report adopted

in toto by the Senate Committee on Claims) states that—

> The chief purpose of this bill[1] is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act [before suit can be brought in the admiralty courts]. H. Rep. No. 913 68th Cong., 1st sess, p. 1; S. Rep. No. 941, 68th Cong., 2nd sess. p. 1.

The whole emphasis of the report is upon collision cases.[2] As the court below properly observed (R.

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[1] Petitioner's emphasis (Pet. 16) upon the word "chief" to support its construction of the Act is not persuasive since the word was obviously intended by the Committee to note awareness of the fact that Section 1 of the Act also permitted compensation for towage and salvage services rendered to a public vessel.

[2] For example, in referring to the "only general legislation covering the subject matter of the pending bill"—an Act authorizing the Secretary of the Navy to adjust claims not exceeding $3,000—the report (p. 5) characterizes that Act as "wholly inadequate, since the damages in collision cases are usually very large in amount." Again, in reviewing the practice of other countries, the report (*ibid.*) speaks of the English procedure "in the case of a collision" between a public and a private vessel. And the House Committee attached to its report letters from various governmental departments to the Committee on Claims, in reply to a request for their views upon a predecessor bill authorizing suits in admiralty for collisions caused by public vessels.

10), there is not "the faintest suggestion either in the correspondence [attached to the report] or in the report itself that the bill would effect a general waiver of the sovereign immunity from suit on all claims for damages resulting from the negligence of the personnel of a public vessel even though the vessel itself was not the physical instrument which did the injury."

The replacement of the earlier bill (H. R. 6989, allowing suits for collisions caused by public vessels) by the later bill (H. R. 9535, authorizing suits for damages caused by public vessels), does not show an intention to enlarge the scope of the waiver of immunity to the extent contended for by petitioner, for the committees favorably reporting the later bill attached to their reports the correspondence from the department heads regarding the earlier bill (H. Rep., *supra*, pp. 6–23; S. Rep., *supra*, pp. 6–23), and in the debates, the sponsors expressly stated that H. R. 9535, the later measure, had the approval of the governmental departments (66 Cong. Rec., 2088, 3560).[3] In

[3] The later bill was apparently the result of the departmental letters discussing the earlier bill, for most of the changes made by the later bill were suggested by the departmental letters.

Thus, as the Attorney General suggested, a requirement for securing the consent of the Attorney General prior to institution of any suit was deleted, the interest provision in Section 2 was modified to prevent interest from running until after judgment, and Section 3 was amended to require the posting of security by cross libelants. Similarly, in ac-

the words of the court below (R. 11), "certainly if Congress had contemplated that H. R. 9535 would permit suit against the United States for all damages resulting from the negligence of naval personnel aboard public vessels it would not have used this correspondence as it did, but would have submitted the new bill to the department heads for their views upon the desirability of such a radical departure from historic sovereign immunity."[4] The court below, therefore, reasonably concluded that the change in the phraseology of the bills from "collisions" to "damages" at most extended the waiver of immunity beyond actual collision cases to cases where the vessel is the "physical cause of the injury" although it does not come

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cordance with recommendations of the Secretary of State, the bill was given an earlier retroactive date, the courts rather than the State Department were to determine whether particular foreign countries granted reciprocity, and the phrase "head of any independent establishment" was added to Section 4. (See H. Rep., *supra*, pp. 6–7, 11–13; S. Rep., *supra*, pp. 6–7, 11–13.)

[4] The portions of the Attorney General's letter quoted in the petition (p. 19) are taken out of context. The petition omits the following sentence which immediately succeeds the first quoted sentence:

"The Supreme Court in the *Western Maid* group of cases (257 U. S. 419) has decided to the contrary. * * *"

And the second sentence of the quotation in the petition (p. 19) is taken out of a subsequent paragraph where the Attorney General was discussing the question of whether the proposed act limited recovery to the value of the vessel. The complete text of the letter appears in H. Rep. No. 913, 68th Cong., 1st sess., pp. 11–13, and in S. Rep. No. 941, 68th Cong., 2d sess., pp. 11–13.

into "actual physical contact with the injured object" (R. 10).

This construction is supported by decisions of this Court and the English Court of Appeals construing similar language in other statutes. *The Osceola*, 189 U. S. 158 ("damages arising from injuries done to persons or property by such ship"); *The Vera Cruz* (No. 2), 9 L. R. Prob. Div. 96 ("damages done by any ship"). The view that under the Public Vessels Act the vessel must be the physical instrument by which the damage is done is also reflected in *Dobson* v. *United States*, 27 F. (2d) 807 (C. C. A. 2), certiorari denied, 278 U. S. 653, which quotes from *The Osceola*, and in *O'Neal* v. *United States*, 11 F. (2d) 869 (E. D. N. Y.), affirmed, *per curiam*, 11 F. (2d) 871 (C. C. A. 2), which quotes from *The Vera Cruz*. Petitioner's contention would ignore these authorities as well as the principle that statutes waiving sovereign immunity must be strictly construed in favor of the Government. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Blackfeather* v. *United States*, 190 U. S. 368, 376; *Schillinger* v. *United States*, 155 U. S. 163, 166.

2. Petitioner asserts (Pet. 18–23) that the Act imposes liability in any circumstances where the vessel "as a juristic person" would be liable *in rem* for acts and omissions of her personnel. This construction of the Act finds no support in its

language or its legislative history. And unlike the Suits in Admiralty Act of 1920, which authorizes a libel *in personam* against the United States "in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained" (sec. 2), the Public Vessels Act authorizes such a libel only where the damage is "caused by a public vessel."[5] Section 2 of the Public Vessels Act, providing that suits thereunder "shall be subject to and proceed in accordance with the provisions" of Section 3 of the Suits in Admiralty Act "insofar as the same are not inconsistent herewith," is intended merely to incorporate the procedure for trial of suits authorized by Section 1 of the Public Vessels Act. Even if Section 3 of the Suits in Admiralty Act also extended to substantive matters, it could not broaden the liability imposed by Section 1 of the Public Vessels Act, for the Section would then be "inconsistent" with Section 3 of the earlier Act to that extent.

3. Contrary to petitioner's contention (Pet. 5, 9–14), the decision below does not present a con-

[5] Petitioner's intimation (Pet. 20) that the Act is "coextensive" with the Suits in Admiralty Act is plainly unsound. The use of entirely different language in Section 1 of the Public Vessels Act and Section 2 of the Suits in Admiralty Act (each delineating the scope of the Act involved) cannot be attributed to accident, since where Congress wished to adopt the same provisions for both Acts, as in the case of procedure, it did so expressly (sec. 2 of the Public Vessels Act).

flict with other decisions so as to merit review by this Court. In *The Harding Highway*, 53 F. (2d) 938, an earlier decision of the court below, the jurisdictional question involved was neither urged nor considered, and a majority of the court below did not regard that case as a controlling precedent. The only other circuit court of appeals case cited by petitioner, *New England Maritime Co.* v. *United States*, 55 F. (2d) 674 (D. C. Mass.), affirmed *sub nom. United States* v. *Gould* on the opinion below, 73 F. (2d) 1016 (C. C. A. 1), involved an actual collision, and the only question considered by the court was whether the Public Vessels Act allows suit for damages to persons as well as property.[6]

[6] There is no conflict with decisions of district courts, for in each cited case the vessel was "the physical cause" of the damage. In *Coastwise Transportation Corp.* v. *United States*, 43 F. (2d) 401 (D. C. Me.), which is of doubtful validity even on the merits (cf. *The Sarnia*, 261 Fed. 900 (C. C. A. 2)), a private vessel attached by a towline to a Navy tug struck a reef. In *McCormack Sand and Gravel Corp.* v. *United States*, 1938 A. M. C. 1569 (E. D. N. Y.), where the jurisdictional question was not even considered, scows were damaged by swells negligently set up by a United States destroyer. In *Porello* v. *United States*, 33 F. Supp. 569 (S. D. N. Y.), the issue was whether a stevedore injured on a public vessel could sue under the Act. The opinion of the court is rather ambiguous. However, the departmental files reveal that the stevedore's injuries were caused by falling hatch covers and hatch beam, so that it may be said that the vessel was "the physical cause" of the damage.

CONCLUSION

The decision below is correct and involves no conflict. Therefore, we respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1944.

APPENDIX

1. The Public Vessels Act, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant ves-

sels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

SEC. 3. That in the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: *Provided*, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of this Act, the respondent in the cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given.

SEC. 4. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena.

SEC. 5. That no suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

SEC. 6. That the Attorney General of the United States is hereby authorized to arbitrate, compromise, or settle any claim on which a libel or cross libel would lie under the provisions of this Act, and for which a libel or cross libel has actually been filed.

SEC. 7. That any final judgment rendered on any libel or cross libel herein authorized, and any settlement had and agreed to under the provisions of section 6 of this Act, shall, upon presentation of a duly authenticated copy thereof, be paid by the proper accounting officer of the United States out of any moneys in the Treasury of the United States appropriated therefor by Congress.

SEC. 8. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

SEC. 10. That the Attorney General of the United States shall report to the Congress at each session thereof all suits in which final judgment shall have been rendered and all claims which shall have been settled under this Act.

2. The Suits in Admiralty Act, 41 Stat. 525 (46 U. S. C. 741–752), provides in part as follows:

SEC. 2. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. Such suits shall proceed and shall be heard and determined according to the

principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title.

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